

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the matter of)	
)	
Modifying the Commission's Process)	
to Avert Harm to U.S. Competition)	IB Docket No. 05-254
and U.S. Customers Caused by)	
Anticompetitive Conduct)	
)	

**REPLY COMMENTS OF
CABLE & WIRELESS JAMAICA LIMITED**

Cable & Wireless Jamaica Limited ("C&WJ"), by its attorneys, hereby submits these brief reply comments in response to the Commission's *Notice of Inquiry* in the above-captioned proceeding. In general, C&WJ will not reiterate the points made in its initial comments, but rather will focus on responding to specific points raised by commenting parties.

I. THE U.S. CARRIERS' REQUEST THAT CERTAIN CONDUCT SHOULD BE REGARDED AS PRESUMPTIVELY ANTICOMPETITIVE SHOULD BE REJECTED AS OVERBROAD

Several U.S. carriers have asked the Commission to regard virtually all circuit blockages and other types of service disruptions as presumptively anti-competitive conduct by foreign carriers. *E.g.*, AT&T Comments at 5-10; MCI Comments at 5; Sprint Nextel Comments at 2. AT&T has even gone so far as to ask the Commission to prohibit foreign carriers from terminating their contractual service agreements with U.S. carriers. These requests should be rejected as overbroad, and they confirm C&WJ's fears that U.S. carriers will seek to manipulate the Commission's procedures to exert commercial leverage over foreign carriers in situations where no real whipsawing behavior has occurred or been threatened.

As C&WJ stated in its opening comments, it is not whipsawing, nor does it pose any threat of anticompetitive conduct, when one or more foreign carriers seek to raise settlement

or termination rates to comply with a law or rule adopted by the foreign government. In the case of the Government-mandated universal service surcharge in Jamaica, where the role of the Jamaican carriers was to act as collection agents to obtain and remit the surcharge to the Government, the surcharge embodies neither an increase in the rate paid to C&WJ for terminating minutes nor a commercial term subject to negotiation between the parties. Collection and payment of the surcharge was required by law in Jamaica, and blocking the circuits of U.S. carriers who did not agree to pay the surcharge did not constitute anticompetitive conduct of any kind.

In its comments, the Jamaican Ministry of Commerce, Science & Technology (“Jamaican Ministry”) confirms that the circuit blockages that occurred on the U.S.-Jamaica route “ought not to be categorized as . . . anti-competitive behavior.” *See* Jamaican Ministry Comments at 2. The Jamaican Ministry also confirms that the rate increase requested by the Jamaican carriers “was necessitated by the recent change in Jamaican Law, which the Jamaican carriers were obliged to obey or risk losing their licences.” *Id.* at 3. Along the same lines, the Jamaican Ministry notes that “the rate increases were not sought in an attempt to increase settlements for [the Jamaican carriers’] own benefit, but were based entirely on their legal obligation to comply with Jamaican law.” *Id.* at 4. In general, C&WJ submits that it would be incorrect to characterize as “whipsawing” or “anticompetitive” any circuit blockage undertaken by a foreign carrier to implement foreign legal or regulatory mandates, such as the universal service surcharge imposed by the Jamaican Government.

Similarly, C&WJ opposes AT&T’s request that the Commission intervene to prevent a foreign carrier from terminating an operating agreement. *See* AT&T Comments at 2 (summary) & 8. Virtually all operating agreements have provisions entitling each party (the U.S.

carrier as well as the foreign carrier) to terminate the relationship for any or no reason, often subject to specific advance notice requirements. In C&WJ's view, it is never whipsawing when a foreign carrier exercises a contractual right, including the right to terminate an operating agreement (or to decline to renew an expired agreement). There is no legitimate basis in law or policy to force a foreign carrier to enter into or continue a business relationship with a U.S. carrier against its will, or otherwise to prohibit a foreign carrier from engaging in conduct that is fully consistent with its contractual obligations to U.S. carriers. Notably, MCI agrees that Commission intervention is not justified when a foreign carrier is exercising its contractual rights. *See* MCI Comments at 5, 6 n.15 & 8; *see also* Jamaican Ministry Comments at 5 ("no carrier should be under an obligation to provide services in the absence of an enforceable agreement").

Lastly, C&WJ wishes to note its agreement with the Caribbean Association of National Telecommunications Organizations ("CANTO") that there is no basis for condemning out of hand all requests made by foreign carriers to increase the settlement or termination rate on a route. *See* CANTO Comments at 7-8. In cases where costs have increased, or where shifting traffic flows have lowered the effective termination rate earned by the foreign carrier, a rate increase is fully consistent with recognized principles of cost-oriented pricing.

II. THE COMMISSION SHOULD RESIST CALLS FOR IMPOSITION OF UNILATERAL POLICIES THAT WOULD PROVIDE U.S. CARRIERS WITH UNFAIR NEGOTIATING LEVERAGE OVER FOREIGN CARRIERS

C&WJ is dismayed by the procedural and remedial proposals offered by several U.S. carriers. If adopted, these proposals would permit the U.S. carriers to use the Commission as their "hired gun" to obtain (upon the U.S. carriers' request) more bargaining leverage by inflicting economic harm on foreign carriers. C&WJ recommends that the Commission not

adopt a “shoot first and ask questions later” regime for dealing with cases of alleged whipsawing by foreign carriers.

C&WJ is particularly concerned by the U.S. carriers’ arguments that the Commission should launch a preemptive economic strike against a foreign carrier without giving the foreign carrier, its government or other interested parties a meaningful opportunity to participate in the Commission’s proceedings. *E.g.*, AT&T Comments at 15. The Commission would certainly object to such Star Chamber procedures if they were adopted by a foreign regulatory body. C&WJ urges the Commission to act consistent with its history of promoting transparency, and set a precedent for other nations to follow, by making certain that all interested parties have a meaningful opportunity to participate before taking any action against alleged whipsawing conduct by foreign carriers.

The benefits of transparency are particularly apparent here. If the Commission relies solely on *ex parte* information provided by one or more U.S. carriers, there is a serious risk that the Commission will act on the basis of inaccurate or incomplete information. As one example, the U.S. carriers apparently would classify all circuit blockages as anticompetitive whipsawing, even though in the Jamaica situation it is clear on this record that the Jamaican carriers acted only as required by law. The risk of unjustified Commission actions is further aggravated when, as certain U.S. carriers have proposed, information is provided to Commission staff on a confidential basis, or the only evidence of threatened whipsawing is a recollected telephone call or a personal conversation. The Commission should establish procedures that enable all interested parties to participate meaningfully before taking any actions in response to instances of alleged whipsawing.

C&WJ respectfully disagrees with Sprint Nextel's assertion that unilateral and immediate action by the Commission based upon the *ex parte* statements of U.S. carriers would result in "no harm" to the foreign carrier. *See* Sprint Nextel Comments at 4. In general, it is C&WJ's view that any action designed to force foreign carriers to terminate traffic in the absence of an agreement on the termination rate (or, as in Jamaica, in the absence of an agreement to pay a Government-mandated surcharge) cannot be justified. Foreign carriers are always at a significant commercial disadvantage when they terminate traffic for U.S. carriers without an agreement in place regarding the termination rate or the amount of interest U.S. carriers would incur for delayed payments. As a result, C&WJ opposes any action by the Commission which would require foreign carriers to incur costs without any assurance as to the timing or amount of the payments they would receive to cover such costs. In C&WJ's view, were the Commission to adopt the "shoot first and ask questions later" approach advocated by several U.S. carriers, it would create a significant likelihood of material harm for foreign carriers.

C&WJ also urges the Commission to avoid adopting rules or procedures that would create a disincentive for foreign carriers to engage in full and frank commercial discussions with U.S. carriers. If there is a risk that even casual verbal statements would be relayed to the Commission by U.S. carriers as evidence that circuit blockages or other anticompetitive actions are threatened, the quality of the interaction between U.S. and foreign carrier personnel can be expected to deteriorate. This would harm, rather than enhance, the ability and willingness of carriers to resolve commercial issues through negotiations.

III. C&WJ WISHES TO CLARIFY THE RECORD ON CERTAIN FACTUAL MATTERS

C&WJ wishes to correct two factual matters on the record. *First*, Sprint Nextel states that IDT's circuits were not blocked on the U.S.-Jamaica route. *See* Sprint Nextel

Comments at 4. In fact, IDT's circuits were blocked and, like other U.S. carriers, IDT's circuits were restored once they agreed to pay the Government-mandated surcharge. *Second*, the Jamaica Competitive Telecoms Association and Reliant Enterprise Communications Ltd assert that C&WJ deliberately reduced termination rates on the U.S.-Jamaica route in order to undermine the development of competition in Jamaica. While that issue is outside the purview of this proceeding, C&WJ would like to ensure that the record correctly reflects that regulatory decisions and market forces, not C&WJ's actions, forced termination rates to their current levels. As the Jamaican Ministry has noted, it was the "advent of competition" and "the rapid liberalization process" in Jamaica that caused termination rates to decline. *See* Jamaican Ministry Comments at 2.

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CERTIFICATE OF SERVICE

I, Theresa A. Baum, hereby certify that I have served a copy of the foregoing **Reply Comments of Cable & Wireless Jamaica Ltd.** on this 27th day of October 2005, upon the following parties by email:

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